Office - Supreme Court, U.S.
FILED
NOV 10 1984
ALEXANDER L. STEVAS.
CLERK

No. 84-358 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

LOCAL 1814, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
ROBERT E. ALLEN
Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
LINDA SHER
Assistant General Counsel
ROBERT C. BELL, JR.
Attorney
National Labor Relations Board
Washington, D.C. 20570

21pp

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Board properly found that the Union's president and vice-president acted as agents of the Union in arranging and participating in a scheme whereby the Company agreed to recognize the Union as the representative of its employees and pay a percentage kickback to the two union officials in exchange for their agreement to obtain business for the Company.

2. Whether the Board's order was a reasonable exercise of its discretion to remedy the unfair labor practice found.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	2
Argument	10
Conclusion	16

TABLE OF AUTHORITIES

Cases:

American Bakery & Confectionery Workers Int'l Union v. *NLRB*, 379 F.2d 160 ..... 10, 16

American Fur Co. v. *United States*, 27 U.S. (2 Pet.) 358 11

Garment Workers' Union v. *NLRB*, 366 U.S. 731 10

International Association of Machinists v. *NLRB*, 311 U.S. 72 15

International Longshoremen's & Warehousemen's Union, 79 N.L.R.B. 1487 ... 11

Midwest Piping & Supply Co., 63 N.L.R.B. 1060 ..... 7, 8, 9

NLRB v. *American Beef Packers, Inc.*, 438 F.2d 331, cert. denied, 403 U.S. 919 16

NLRB v. *District 50, United Mine Workers*, 355 U.S. 453 ..... 15, 16

NLRB v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 15

NLRB v. *Local 815, International Brotherhood of Teamsters*, 290 F.2d 99 11

NLRB v. *Newport News Co.*, 308 U.S. 241 15

Cases—Continued: Page

NLRB v. *Seven-Up Bottling Co.*, 344 U.S. 344 14

NLRB v. *Vernitron Electrical Components, Inc.*, 548 F.2d 24 16

NLRB v. *Yeshiva University*, 444 U.S. 672 15

Scotto v. *Waterfront Comm'n*, No. 558081 (N.Y. Sup. Ct. Sept. 19, 1980), aff'd, 78 A.D. 2d 686, 434 N.Y.S. 2d 1004 6

Sweater Bee by Banff, Ltd., 197 N.L.R.B. 805, enforced, 486 F.2d 1395 10

United States v. *Scotto*, 641 F.2d 47, cert. denied, 452 U.S. 961 6

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 11

Virginia Electric & Power Co. v. *NLRB*, 319 U.S. 533 ..... 14, 15

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 2

§ 2(13), 29 U.S.C. 152(13) 2, 11

§ 8(a)(1), 29 U.S.C. 158(a)(1) 6, 10

§ 8(a)(2), 29 U.S.C. 158(a)(2)... 6, 7, 8, 10, 13

§ 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A) 6, 10, 13

Labor-Management Relations Act, 29 U.S.C. 141 *et seq.* 2

§ 302, 29 U.S.C. 186 13

Miscellaneous:

Restatement (Second) of Agency (1958) ... 11

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-358

LOCAL 1814, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 735 F.2d 1384. The decision and order of the National Labor Relations Board (Pet. App. 111a-124a), including the decision of the administrative law judge (Pet. App. 50a-110a), are reported at 265 N.L.R.B. 1688.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1984. A petition for rehearing was denied on July 23, 1984 (Pet. App. 48a-49a). The petition for a writ of certiorari was filed on September 5, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, and of the Labor-Management Relations Act, 29 U.S.C. 141 *et seq.*, are set forth at Pet. App. 125a-128a. In addition, Section 2(13) of the National Labor Relations Act, 29 U.S.C. 152(13), provides:

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

STATEMENT

1. Jackson Engineering Co. (Jackson or the Company) has been engaged in the business of major ship repairs and renovations at various locations in New York and New Jersey since 1948. Until 1975, its employees were not represented by any labor organization. In 1975, Nicholas Seregos, who was at all relevant times the principal owner and president of the Company, concluded that his efforts to obtain business were hampered by the Company's status as a non-union employer. Seregos had observed over time that potential clients, particularly United States flagships, repeatedly rejected his solicitations on the ground that the Company was not a union shop. Pet. App. 52a-54a; A. 31, 45, 59, 164, 218, 294-295.[1]

Sometime in mid-1975, Seregos telephoned Anthony Anastasio at his union office. Anastasio, secretary-treasurer and later executive vice president of the local that became petitioner International Longshoremen's

---

[1] "A." refers to the joint appendix filed in the court of appeals, which includes relevant portions of the record before the Board.

Association Local 1814,[2] was responsible for administering contracts for Local 1814 in the ship repair industry. Seregos expressed interest both in obtaining new business and in unionizing the Company, and the two later met for further discussions. Pet. App. 54a; A. 147, 166-167, 168. At a meeting in early July 1975, Anastasio offered to obtain business for the Company in exchange for a kickback of ten percent of the proceeds. In addition, Anastasio made clear that he would help the Company only on the condition that it unionize. Seregos agreed to both the kickback arrangement and to unionization of the Company's workforce. Pet. App. 54a; A. 169-171, 212-214. Thereafter, at another meeting at Local 1814's office, Anastasio instructed Seregos to write to Prudential Lines, a United States flag line, and on July 11, 1975, Seregos wrote a letter falsely stating that the Company was a union shop and that its employees were members of Local 1814 (Pet. App. 54a; A. 171-173, 215-216).

Local 1814 obtained union authorization cards from the Company's employees on September 15, 1975. Later that month, Seregos signed a memorandum agreeing to recognize the Union, and the Company began to check off employees' union dues and forward them to the Union. Pet. App. 55a; A. 214. Sometime in the fall of 1975, Seregos met with Anastasio and Anthony Scotto, president of Local 1814, at the local's office. Seregos again expressed interest in obtaining more work for the Company, and Scotto said that he could help Seregos get business with United States Shipping Lines. The three men then discussed the

---

[2] Anastasio at the time was secretary-treasurer of Local 1277, ILA. Local 1277 and other locals merged into Local 1814 in March 1978, and Anastasio later became executive vice president of that local. It is undisputed that Local 1814 is the successor to Local 1277, and the local hereinafter will be referred to as Local 1814. Pet. App. 54a n.3; A. 33, 72.

method by which Seregos would pay the ten percent kickbacks. Scotto offered to assist Seregos in setting up a foreign corporation for that purpose, but Seregos responded that that would not be necessary. Pet. App. 55a; A. 175-178.

The Company began receiving business from both Prudential Lines and United States Shipping Lines in the early fall of 1975. The Company and Local 1814 signed a multi-employer three-year collective bargaining agreement containing union security and check-off provisions effective November 3, 1975. The contract was signed by Anastasio and Scotto for the Union. Late in the year, Anastasio told Seregos that the kickback payments were to be made in cash, and Seregos agreed. Pet. App. 55a; A. 181, 182, 183-184, 218, 226, 227, 236, 238.

Seregos began making cash payments to Anastasio at the Union's office in early 1976, and payments for that year totaled $15,000. Seregos paid a total of $16,000 in 1977 and $28,700 in 1978.[3] Throughout the period in which the payments were made, Scotto remained president of the Union and Anastasio, who moved from secretary-treasurer to executive vice president (see page 3 note 2, *supra*), continued to exercise chief responsibility for administering Local 1814 contracts in the ship repair industry, including the contract with Jackson Engineering Co. On November 3, 1978, the Company and the Union renewed their collective bargaining agreement for three more years. The contract was executed by Anastasio and Joseph Collazzo for Local 1814 and by Seregos for the Company. Pet. App. 56a-57a; A. 147-148, 184-185, 187, 192-194, 218, 238-243.

---

[3] In 1977, Seregos paid Anastasio $5,000 on June 2, $1,000 on October 6, $5,000 on November 17, and $5,000 on December 19. In 1978, Seregos made separate $5,000 payments on February 28, March 23, April 10, May 15, and November 15, and paid $3,700 on July 3. Pet. App. 56a; A. 184-185, 187, 192-194.

In January 1979, Anastasio and Scotto were indicted by a federal grand jury for their receipt of payments from certain employers (not including Jackson Engineering Co.) under contract with Local 1814 (Pet. App. 57a; A. 138). At a meeting in Anastasio's office in early May, Anastasio asked Seregos if any money was due "against the work." When Seregos balked at payment due to the indictment and ongoing investigation, Anastasio assured him that payments should continue to be made, and Seregos paid Anastasio $4,000 on May 8, 1979. Seregos paid an additional $4,000 on July 5 in response to Anastasio's request for a contribution to help pay Scotto's legal fees. Pet. App. 56a-57a; A. 198-203. In a superseding indictment returned on July 31, 1979, Scotto and Anastasio were charged with additional unlawful conduct, including receipt of the payments from Seregos to Anastasio during the period 1977 to 1979 (Pet. App. 57a; A. 139-140).

Meanwhile, in June 1979, the Company had purchased a drydock facility in Staten Island from Brewer Drydock Co. and recognized Local 1814 as the representative of its employees there. Representatives of the Company and the Union thereafter met to discuss modification of the existing contract in view of the Company's purchase of the Staten Island facility.[4] On September 15, 1979, the parties reached agreement on a new contract that provided for reductions in wages and certain benefits for most employees of the Company. Pet. App. 65a; A. 36-37, 96, 105, 110, 111, 119-120, 128, 138-139, 244-291. Scotto and Anastasio did not personally take part in the negotiations, but throughout the period they remained the Union's highest ranking offi-

[4] The Company contended that its purchase of the new facility would result in more steady work for its employees, but that it needed to reduce its labor costs in order to obtain the work that its new drydock facility would allow it to perform (Pet. App. 64a).

cers (Pet. App. 57a). By the time the Company had acquired the Staten Island facility in 1979, both its volume of business and its total number of employees—all members of Local 1814—had grown substantially from the 1975 levels (*ibid.*).

In January 1980, Scotto and Anastasio were convicted in federal court on criminal counts of receiving unlawful labor payments, in violation of Section 302 of the Labor-Management Relations Act (29 U.S.C. 186), and of various counts of racketeering, conspiracy, and tax evasion. More specifically, Anastasio was convicted of unlawfully receiving payments from Seregos, and he was sentenced to two years' imprisonment, five years' probation, and a $50,000 fine. Scotto, who was not indicted with respect to those payments, was convicted on other counts and was sentenced to five years' imprisonment, five years' probation, and $75,000 in fines. At the sentencing proceeding in February 1980, the district judge also ordered that Anastasio and Scotto forfeit their offices in the Union. Pet. App. 58a. The convictions were affirmed in September 1980. See *United States* v. *Scotto*, 641 F.2d 47 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981). At about the same time, in a separate state court proceeding, the Appellate Division of the New York Supreme Court affirmed a lower court order directing that Anastasio and Scotto be removed from union office. See *Scotto* v. *Waterfront Comm'n*, No. 558081 (N.Y. Sup. Ct. Sept. 19, 1980), aff'd, 78 A.D.2d 686, 434 N.Y.S. 2d 1004 (1980). They were not replaced as union officers until May 1981 (Pet. App. 59a).

2. The Board, adopting in part the findings and conclusions of the administrative law judge, found that the Company violated Section 8(a)(2) and (1) of the Act, 29 U.S.C. 158(a)(2) and (1), and that the Union violated Section 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A), by participating in the kickback scheme (Pet. App. 82a-89a,

112a-113a).[5] The Board noted that "the parties do not disagree that such payments if made by Jackson to 'a labor organization,' constitute violations of * * * the Act," and that "[t]he key issue * * * is * * * whether Anastasio and Scotto were agents of the [Union] with respect to this conduct" (*id.* at 83a). It determined that Anastasio, as the Union's second highest ranking official, had authority for organizing employees and securing recognition from employers, as well as for executing and administering collective bargaining agreements on behalf of the Union, and that the arrangement for payments and union referrals of business was "not * * * easily divorced from Anastasio's position and responsibilities" (*id.* at 85a). In particular, the Board found that the arrangement was "intimately connected to and arose out of Jackson's decision to recognize and sign a collective bargaining agreement" with the Union and that it substantially furthered the interests of Local 1814 both by extending the Union's repre-

[5] The unfair labor practice proceedings were initiated by Local 17, Industrial Union of Marine and Shipbuilding Workers of America, which had represented employees of Brewer Drydock Co. prior to the acquisition of the drydock facility by Jackson Engineering Co. in 1979. Local 17 filed charges alleging various violations of the Act stemming from refusal to hire former Brewer employees and to recognize Local 17 as the representative of employees at the Staten Island facility, and also alleging that the Company violated Section 8(a)(2) under the Board's rule in *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060 (1945), by recognizing Local 1814 over Local 17 while a real question existed concerning representation of the Staten Island employees between the two unions. The Board's General Counsel declined to issue a complaint based on the Company's refusal to hire former Brewer employees and to bargain with Local 17, but issued a complaint on the *Midwest Piping* charge. In addition, the General Counsel's investigation revealed evidence of the kickback scheme, and the complaint alleged a separate violation against the Company and Local 1814 based on that conduct. Pet. App. 69a-74a.

sentation of ship workers and by ensuring the viability of the unionized Company (*id.* at 85a-86a). In addition, the Board noted that the scheme had been devised by Anastasio with the awareness, participation, and approval of Union president Scotto, the local's highest ranking officer (*id.* at 87a). On the basis of these factors, the Board concluded that Scotto and Anastasio had acted as agents of the Union.[6]

The Board's order required the Company and the Union to cease and desist from continuing the unlawful payments. The Board also set aside the parties' September 1979 contract and ordered the Company to cease recognition of Local 1814, and the Union to cease acting as the representative of the Company's employees, until such time as the Union might be certified by the Board.[7] Finally, the Board ordered the Company and the Union, jointly and severally, to reimburse the Company employees who joined the Union after the effective date of the September 1979 collective bargaining agreement for the dues and fees that they had paid to the Union. Pet. App. 114a-116a. In explaining its reasons for setting aside the parties' bargaining relationship and the contract, the Board stated (*id.* at 114a):

> [A]t or about the same time [the parties] were negotiating midterm contract modifications granting [the] Employer economic concessions, concealed payments involving large sums of money

---

[6] The administrative law judge found that the Company did not further violate Section 8(a)(2), as alleged in the complaint, under the rule in *Midwest Piping* (Pet. App. 89a-105a). No exceptions to the *Midwest Piping* finding were filed before the Board (Pet. App. 112a n.2).

[7] The Board stated that its order did not require the Company "to vary or abandon those wage, hour, seniority, or substantive features of its relations with employees established in the performance of the * * * collective-bargaining agreement" (Pet. App. 115a).

> were changing hands. We find that these concurrent actions operated to taint and undermine the bargaining relationship between [the Company and the Union] and the contract which was negotiated by them while the payments were being made.

3. The court of appeals enforced the Board's order in full (Pet. App. 1a-47a). The court upheld the Board's findings that the dealings of Anastasio and Scotto with the Company generally were within the scope of their employment, and that the kickback arrangement "both 'tended to accomplish an authorized purpose'—the extension of [the] Union's membership—and was motivated 'to an[] appreciable extent' by furtherance of the Union's interests in dues and payments for pension and welfare benefits, and * * * the extension of its representation of longshoremen" (*id.* at 20a). The court noted that "Anastasio's exercise of his power to steer business to Jackson—a power directly related to and derived from his position within the Union—was directly conditioned on the Employer's recognition of Local 1814" (*id.* at 21a (emphasis omitted)). Accordingly, the court upheld the Board's conclusion that "the acceptance of the money—a prohibited form of employer payment and assistance—by the Union's principal officers is properly attributable to Local 1814, and gave rise to a finding that both the Employer and the Union engaged in unfair labor practices" (*id.* at 27a).

In approving the Board's remedy, the court agreed that "the agreement between the Company, the Union, and the Union's principal officers was completely tainted by fraud and corruption from the very beginning" (Pet. App. 23a). In this circumstance, "the Board, when faced with the egregious pattern of concealed unlawful assistance before it, was justified in ordering a completely fresh start to relations between Jackson and its employees" (*id.* at 27a-28a). The court concluded that (*id.* at 30a)

> the Board's decision represents nothing more than a sensible application of routine remedial practices to a slightly unusual case, and * * * its orders were entirely consistent with the purposes of the Act. The Board's approach is based on * * * restoring the employees to the position they would have enjoyed but for the illegal arrangement.

Judge Wald dissented because in her view there was insufficient "evidence on the record demonstrating a relationship between the individual officers' corruption and the union's representation of its members" (Pet. App. 43a).

ARGUMENT

1. As it did before the Board (Pet. App. 83a) and the court of appeals (*id.* at 15a-16a), petitioner[8] concedes (Pet. 6) that, if the kickback payments in this case were made to the Union or its agents, they constituted unlawful financial assistance to a labor organization in violation of Section 8(a)(2), and the Union's receipt of such payments violated Section 8(b)(1)(A).[9] Petitioner's sole contention with respect to the Board's finding of a violation is thus that (Pet. 6) "no substantial evidence was adduced" under established agency principles to show that Anastasio and Scotto acted as the Union's agents in the kickback scheme. The decision below does not conflict with any decision of this Court or any other court of appeals, and the Board's application of settled principles to particular facts does not warrant this

---

[8] The Company has not filed a petition for a writ of certiorari to review the Board's finding that it violated Section 8(a)(2) and (1) (see Pet. i). Insofar as the caption of the petition lists the Company as a petitioner, it is erroneous.

[9] See *American Bakery & Confectionery Workers Int'l Union* v. *NLRB*, 379 F.2d 160, 163 (D.C. Cir. 1967); *Sweater Bee by Banff, Ltd.*, 197 N.L.R.B. 805-806 (1972), enforced, 486 F.2d 1395 (2d Cir. 1973). See also *Garment Workers' Union* v. *NLRB*, 366 U.S. 731, 738 (1961).

Court's review, particularly in light of the novel facts presented here. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, there is no merit to petitioner's contention. It is well-settled that a principal is responsible for the acts of an agent committed within the general scope of the agent's employment. See, *e.g.*, *American Fur Co.* v. *United States*, 27 U.S. (2 Pet.) 358, 364 (1829); *NLRB* v. *Local 815, International Brotherhood of Teamsters*, 290 F.2d 99, 103-104 (2d Cir. 1961). An agent acts within the scope of his employment "if the principal actually empowered the agent to represent him in the general area within which the agent acted." *International Longshoremen's & Warehousemen's Union*, 79 N.L.R.B. 1487, 1509 (1948) (footnote omitted). Thus, as Congress made clear in Section 2(13) of the Act, 29 U.S.C. 152(13), "whether the specific acts performed were actually authorized or subsequently ratified" is not controlling on the question whether a principal is bound by the acts of its agent. Moreover, even where the agent is motivated by self-interest or engaged in criminal conduct, his acts fall within the scope of his employment so as to bind the principal so long as the agent is motivated by the principal's business purposes "to any appreciable extent" and his acts "tend[] to accomplish an authorized purpose." Restatement (Second) of Agency § 228 & comment b at 504-505, § 236 & comment b at 523-524 (1958).

Applying these established principles, which petitioner does not dispute, the Board, upheld by the court of appeals, reasonably found that Anastasio and Scotto acted as agents of the Union. As the facts found by the Board demonstrate (see pages 2-8, *supra*), the kickback arrangement and unlawful payments thereunder were an integral part of a plan to extend the Union's representation in the ship repair industry and gain recogni-

tion from the Company. Indeed, the Union's agreement to steer business to the Company in exchange for kickbacks was expressly conditioned on the Company's agreement to recognize the Union.[10] That objective was central to the Union's mission and furthered its institutional interests; moreover, it was clearly an objective that Anastasio and Scotto, as the two highest ranking officers, were authorized to accomplish on behalf of the Union. As the court of appeals observed (Pet. App. 21a), "the kickback scheme was a means to an authorized end," and neither the illegality of the means nor the fact that Anastasio and Scotto may have been motivated by self-interest in addition to the Union's interests serves to negate the agency relationship.[11]

---

[10] Petitioner contends (Pet. 7 n.4) that the Board did not find the Company's recognition of the Union to be a condition of the kickback arrangement because it did not order reimbursement of all membership dues paid since the date of recognition. This contention is incorrect. The Board expressly found (Pet. App. 54a, 85a-86a & n.44) that the illegal payments were "intimately connected" with the Company's agreement to recognize the Union and that the business referral and kickback agreement was expressly conditioned on recognition of the Union. As the court of appeals noted (*id.* at 41a), the Board's decision to order reimbursement of dues only from the 1979 contract was an exercise of the Board's *remedial* discretion, which in no way affected its finding as to liability based on the agency determination. (Petitioner's contention with respect to the appropriateness of the Board's remedy is addressed *infra*.)

[11] In upholding the Board's agency determination, the court of appeals noted, in addition to the factors relied on by the Board, that the Union's retention of Anastasio and Scotto as union officers after the grand jury indictments, and the fact that Anastasio's receipt of unlawful payments continued after the indictments, supported the inference that the Union had knowledge of and acquiesced in the conduct (Pet. App. 23a). Contrary to petitioner's contention (Pet. 10-12), the court did not hold that a Union will always be held responsible for the corrupt acts of its officers unless it removes them from office immediately upon their indictment. Rather, the court found only that, in the

There is thus no basis for petitioner's broad contention (Pet. 7-9) that under the Board's decision a union will be held to violate Section 8(b)(1)(A) whenever an officer engages in corrupt conduct or violates the anti-bribery provision of the Labor-Management Relations Act, 29 U.S.C. 186. As shown above, the Board's finding of a violation was based on its determination that the officials here acted as Union agents. That determination was in turn based on the connection between the receipt of illegal payments from the employer and the employer's agreement to allow the Union to extend its representation over its employees, thereby bringing the payments within the prohibition of Section 8(a)(2) against unlawful assistance to a labor organization. The principle expressed in the Board's decision is, as the court of appeals recognized (Pet. App. 2a-4a, 41a-42a n.29), limited to these novel facts.

2. Petitioner's attack (Pet. 12-16) on the Board's remedy as punitive and overbroad essentially repeats its erroneous argument that the Board improperly found a violation. Indeed, petitioner concedes (Pet. 12) that the Board's order involves the application of traditional unfair labor practice remedies, and it appears to contend only that they should not have been applied in this case because there was no violation to remedy.

In any event, as the court of appeals made clear (Pet. App. 27a-41a), the Board's remedy in this case—the cease-and-desist order, the termination of the parties' collective bargaining relationship and nullification of the 1979 contract, and the requirement to reimburse dues collected pursuant to that contract—was reasonably re-

---

circumstances of this case—in which the conduct was intimately connected with an authorized union purpose—the fact that Anastasio and Scotto were permitted to continue their unlawful conduct after it had become publicly known was further evidence, in addition to the factors relied on by the Board, that they had acted and continued to act on behalf of the Union.

lated to the scope of the violation found and therefore within the Board's broad remedial discretion. See *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346-348 (1953); *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 539-540 (1943). As the Board explained (see pages 8-9, *supra*), the close connection between the ongoing corrupt conduct, the Company's decision to recognize the Union, and the subsequent negotiations "operated to taint and undermine the [parties'] bargaining relationship * * * and the contract which was negotiated by them while the payments were made" so as to justify restoring the Company's employees to the position they would have been in but for the illegal arrangement.

Petitioner likewise errs in contending (Pet. 8, 13-15 & n.11) that the Board could not order discontinuance of the bargaining relationship and set aside the contract without showing that an uncoerced majority of employees do not currently wish to have the Union represent them. The Board found that the entire bargaining relationship, including the Company's initial decision to recognize the Union (which occurred before any employees had indicated their preference for the Union's representation), was infected by the Company's concealed unlawful assistance and that the Union's representation of the Company's employees was therefore compromised notwithstanding the willingness of employees currently to designate the Union as their representative.[12] As

[12] Contrary to petitioner's contention (Pet. 8), the Board did not adopt the administrative law judge's finding that the Union actually represented an uncoerced majority of the Company's employees. Although the administrative law judge observed that Local 1814 appeared to represent a majority of the Company's Staten Island employees on the basis of the Company's recognition of the Union at that facility in June 1979, he made that observation only for the purpose of rejecting Local 17's *Midwest Piping* allegations (Pet. App. 79a, 102a, 105a). Because no exceptions to the ALJ's dismissal of the *Midwest Piping* allega-

this Court has recognized, the Board under such circumstances has broad discretion to "reconcile the objectives of eliminating improper employer interference and preserving the employees' full choice of a bargaining representative." *NLRB* v. *District 50, United Mine Workers*, 355 U.S. 453, 461 (1958). The Act envisions a distinct line between labor and management, and under the statutory scheme a collective bargaining representative functions properly only when it is able to represent employees without undue influence by the employer. See *NLRB* v. *Yeshiva University*, 444 U.S. 672, 682 (1980); *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 193 (1981) (Powell, J., concurring in part and dissenting in part). In order to free the collective bargaining process of the effects of an employer's unlawful assistance, the Board, with court approval, often has ordered the employer to withhold recognition from the assisted union until such time as it may be certified by the Board. See *NLRB* v. *District 50, United Mine Workers*, 355 U.S. at 458-459; *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. at 539-541; *International Association of Machinists* v. *NLRB*, 311 U.S. 72, 75 (1940); *NLRB* v. *Newport News Co.*, 308 U.S. 241, 248-251 (1939).

In line with these principles, the purpose of the order entered in this case is to allow the effects of the unfair labor practice to be dissipated, and this purpose is unaffected by the current desires of the Company's employees. After the effects have been dissipated, if a major-

---

tions were filed with the Board, the Board had no occasion to pass on the ALJ's finding in that context. It is clear, however, that, in finding that the kickback scheme was violative of the Act and in fashioning an appropriate remedy for that violation, the Board implicitly overruled the ALJ's finding of an uncoerced majority by concluding that the scheme and the payments thereunder tainted and undermined the bargaining relationship between the Union and the Company (Pet. App. 113a-114a).

ity of the Company's employees wish to be represented by the Union, they will be free to choose the Union as their bargaining representative in a Board-conducted election.[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney
National Labor Relations Board

NOVEMBER 1984

---

[13] See *NLRB* v. *District 50, United Mine Workers*, 355 U.S. at 458-459; *NLRB* v. *American Beef Packers, Inc.*, 438 F.2d 331, 333-334 (10th Cir.), cert. denied, 403 U.S. 919 (1971); *NLRB* v. *Vernitron Electrical Components, Inc.*, 548 F.2d 24, 27 (1st Cir. 1977); *American Bakery & Confectionery Workers Int'l Union* v. *NLRB*, 379 F.2d 160, 163 (D.C. Cir. 1967).